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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
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File Name: 10a0312p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-4679

[Filed September 24, 2010,
as corrected September 29, 2010,
and October 7, 2010]

MARK MILLER; COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES; and WEDEMANDAVOTE.COM, *Plaintiffs-Appellees*,	)
v.	)
CITY OF CINCINNATI; MILTON R. DOHONEY; and JOEL KOOPMAN, *Defendants-Appellants.*	)

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 08-00550—Michael R. Barrett, District Judge.

Argued: November 17, 2009

Decided and Filed: September 24, 2010

Before: DAUGHTREY, COLE, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Paula Boggs Muething, CITY OF CINCINNATI, OFFICE OF THE SOLICITOR, Cincinnati, Ohio, for Appellants. Christopher P. Finney, FINNEY STAGNARO SABA & PATTERSON CO., LPA, Cincinnati, Ohio, for Appellees. **ON BRIEF:** Paula Boggs Muething, CITY OF CINCINNATI, OFFICE OF THE SOLICITOR, Cincinnati, Ohio, for Appellants. Christopher P. Finney, FINNEY STAGNARO SABA & PATTERSON CO., LPA, Cincinnati, Ohio, Curt C. Hartman, THE LAW FIRM OF CURT C. HARTMAN, Amelia, Ohio, for Appellees. Dale D. Cook, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO. L.P.A., Columbus, Ohio, for Amicus Curiae.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. In this section 1983 action, the plaintiffs, two political advocacy groups and an individual member of one of the groups, claim that defendant City of Cincinnati's regulation governing access to the interior spaces of city hall violates the First and Fourteenth Amendments of the United States Constitution. After ruling in the plaintiffs' favor on a jurisdictional challenge by the defendants, the district court granted

the plaintiffs' motion for a preliminary injunction. The district court concluded that the plaintiffs had established a substantial likelihood of success on the merits of four independent claims: that the challenged regulation (1) unconstitutionally prevented the plaintiffs from accessing city hall for protected-speech activities; (2) unconstitutionally restricted the plaintiffs' right of expressive association by forcing them to collaborate with a government official to gain access to city hall; (3) allowed discriminatory suppression of speech in violation of the Equal Protection Clause; and (4) was void for vagueness under the Due Process Clause. The defendants now appeal.

For the reasons that follow, we conclude that the district court correctly found it had jurisdiction to rule on the plaintiffs' motion for a preliminary injunction. The district court was also correct in holding that the plaintiffs have established a substantial likelihood of success on two of their four claims on which they based their motion: that the City's regulation violates the plaintiffs' right to free speech and that it is unconstitutionally vague. We therefore affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The principal plaintiff, Coalition Opposed to Additional Spending & Taxes (COAST), is an Ohio political action committee that takes positions on a variety of non-partisan issues, including – in this case – opposition to the Cincinnati City Council's authority to implement an automated photo-monitoring program to enforce traffic regulations. Plaintiff Mark Miller is an individual member of COAST, and COAST, in turn,

participates in WeDemandAVote.Com, a political coalition advocating "participatory democracy." The defendants include the City of Cincinnati, city manager Milton Dohoney, and the city facilities manager, Joel Koopman.

COAST twice tried and twice failed to gain access to the interior stairs and the lobby of Cincinnati's city hall to hold a press conference and rally advocating its views. The City denied COAST's first request under the then-controlling version of Administrative Regulation #5, which provided in relevant part:

> This administrative regulation is designed to restate and clarify longstanding City policies regarding the use of public buildings . . . .
>
> No private business enterprises or solicitations should be permitted in City buildings or operated therefrom. Exceptions should be made only by specific approval of the Department Head when it is judged to be in the public interest, as in the case, for example, of the United Way Campaign.
>
> No private signs or advertising materials should be displayed on or in City buildings unless for an approved public purpose authorized by the Department Head.
>
> . . .
>
> In making any exceptions to the above policies, Department Heads are urged to consider not only what is proper, but also how it appears to the public.

In the letter denying COAST's request, defendant Koopman noted that "the use of any City facility is for conducting business related to the functions of our various departments in serving the citizens and by City Council in the performance of their duties." Koopman further explained:

> City Facility Management's practice is that events held inside the building require a City sponsor, either a Council Member or a department as part of their regular business and duties. Private groups, unaffiliated with any department or Council Member, are allowed to use the outside stairs as long as our egress is not blocked.

Koopman encouraged COAST to seek out a city department or city council member willing to sponsor a press conference and rally inside city hall or, in the alternative, to hold the event on the exterior steps.

In fact, various private groups had held events inside city hall through sponsorship by a department official or city council member under the regulation. Most notably, the backers of a tax levy for Cincinnati's public school system, which is governed by an independent school board and not the city council, held a rally on the indoor stairs of city hall that featured city council members and representatives of private community groups as speakers. The Coalition for Community Values, a private group, arranged through the office of a city council member to use a conference room in city hall for a press conference calling on a local newspaper to stop accepting adult-entertainment advertisements. No city council member was present at that press conference; however, two aides to city

council members did attend, although they did not speak.

In addition, the plaintiffs submitted as exhibits calendars that reflected use of the lobby and first floor staircase for charitable campaigns such as the United Way and for art and holiday displays. Conference rooms were booked for various non-profit events and fund-raisers, meetings of the American Society for Public Administrators, the Soccer Committee, Keep Cincinnati Beautiful (a city contractor), and the Earned Income Tax Credit Partnership/Make Work Pay, lectures relating to heart health, and the "Who Killed Our Kids?" campaign. City council chambers were used for such purposes as youth mock-trial activities and recognition ceremonies, Truman Scholarship interviews, concerts, a United Way event, a government-day program put on by the local chamber of commerce, and sessions of Leadership Cincinnati.

After COAST filed the instant action, the City revised Administrative Regulation #5 to provide in relevant part:

> City Hall is lawfully dedicated for the purpose of allowing City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati.
>
> . . .
>
> The interior spaces of City Hall are reserved for use by the Mayor, the City Manager and his assistants, City Councilmembers, City Department Directors, City Commissions and Boards, and City employees. The interior of City

> Hall is open to the public for purposes of visiting City officers and attending City Council and other public meetings. The interior of City hall is not generally available to the public for other purposes.
>
> When the Mayor, City Manager and his assistants, City Councilmembers, City Department Directors, and City Commissions and Boards intend to use interior spaces of City Hall for assemblages, they should notify the Facilities Management Division of the Public Services Department . . . .
>
> Facilities Management is responsible for insuring that the assemblage does not create security problems, unreasonably interfere with ingress or egress from City Hall, or otherwise unreasonably interfere with the other official uses occurring inside City Hall.

Under the revised regulation, the term "assemblages" apparently includes rallies and press conferences. City manager Dohoney instructed Koopman not to schedule any assemblages in the interior front lobby or interior stairs.

In the district court the parties stipulated that the revised regulation shares several similarities to the policy and practice under former Administrative Regulation #5. Under both, private groups seeking to hold rallies or press conferences inside city hall must "politically or administratively collaborate with the Mayor, a member of the Cincinnati City Council, the City Manager and his assistants, a City Department Director, or a City Board or Commission." The

authorized official who "sponsor[s] the use" of city hall by a private group, however, does "not necessarily need to attend the use and/or participate in the use in order for it to proceed." City officials have "full and independent discretion" as to whether they will collaborate with an outside group. Private advocates on one side of a public issue might secure sponsorship for a rally inside city hall, while advocates of the opposing viewpoint on the same issue might be denied access.

When the plaintiffs filed suit, they sought a preliminary injunction preventing the City from regulating access to city hall on the basis of the content or viewpoint of a proposed activity or from continuing to use an ad hoc, discretionary method of granting access to the building. The plaintiffs also asked the district court to order the City to allow the plaintiffs to hold a rally inside city hall. The district court granted the plaintiffs' motion for a preliminary injunction, but the district court's order does not specify whether its effect is to close city hall to outside groups regardless of sponsorship or to grant the plaintiffs access. In any event, the district court granted the City's motion to stay the preliminary injunction pending the instant appeal.

II. DISCUSSION

On appeal, the defendants raise two issues. They first challenge the district court's subject matter jurisdiction, arguing that the plaintiffs lack standing because they suffered no actionable injury and that their claims are both unripe for review and moot. The defendants also contend that the district court erred in

finding that the plaintiffs' claims are substantially likely to succeed on the merits.

A. Subject Matter Jurisdiction

"The issue of standing, and whether a federal court has the power to adjudicate a suit, is 'the threshold question in every federal case.'" *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). We review jurisdictional challenges based on standing, ripeness, and mootness *de novo*. *See Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 278 (6th Cir. 2009) (standing); *In re Cassim*, 594 F.3d 432, 437 (6th Cir. 2010) (ripeness); *Demis v. Sniezek*, 558 F.3d 508, 512 (6th Cir. 2009) (mootness).

1. Standing

As to standing, the City argues that because the plaintiffs did not seek out and fail to secure sponsorship from an authorized official, they have not suffered the requisite injury in fact. The district court concluded that the plaintiffs suffered an injury when the City denied their request for access and told them to find a sponsor. We agree.

A plaintiff has constitutional standing if he: (1) shows a concrete and actual or imminent injury in fact; (2) demonstrates that the defendant's conduct caused the injury; and (3) shows that it is likely, as opposed to merely speculative, that a favorable decision will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Additionally, courts have recognized three prudential limitations on standing, requiring that "plaintiff be a proper

proponent, and the action a proper vehicle, to vindicate the rights asserted." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 403 (6th Cir. 1999) (quoting *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576 (6th Cir. 1991)); *see also Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999) (prudential standing requirements summarized).

When the City instructed the plaintiffs to secure a sponsor, the City placed the plaintiffs' request at the mercy of the unfettered discretion of those officials authorized to grant access. But, as the district court observed, the Supreme Court has held that "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1988). Because unfettered governmental discretion over the licensing of free expression "constitutes a prior restraint and may result in censorship," a plaintiff may bring facial challenges to statutes granting such discretion "even if the discretion and power are never actually abused." *Id.* at 757.

In our view, both the original and revised versions of Administrative Regulation #5 afford authorized officials precisely this kind of unfettered discretion in deciding whether to sponsor an event in the interior of city hall. The defendants attempt to distinguish *City of Lakewood*, arguing that it involved a discretionary speech restriction on a public sidewalk rather than inside a government building. This distinction is irrelevant, however, because in *City of Lakewood* the

Court held that an arbitrary prior restraint on protected speech provides standing regardless of the forum. Hence, when a plaintiff's protected-speech activities are subject to restriction at the government's unfettered discretion, the plaintiff has suffered an injury in fact. We thus conclude that in this case the plaintiffs have standing to sue.

2. Ripeness

Next, the City argues that the plaintiffs' claim is not ripe because the plaintiffs have not sought collaboration with any individual authorized officials. We disagree.

The ripeness doctrine prevents courts from "entangling themselves in abstract disagreements" through premature adjudication. *Grace Community Church v. Lenox Twp.*, 544 F.3d 609, 615 (6th Cir. 2008). Courts consider three factors to evaluate ripeness: "(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings." *Id.* (quoting *Warshak v. United States*, 490 F.3d 455, 467 (6th Cir. 2007)).

Because the plaintiffs' claims are directed at the sponsorship requirement itself and do not allege that officials, in practice, exercise their discretion to grant sponsorship in a discriminatory manner, their claims are ripe. COAST has been twice denied access to city hall for noncompliance with the sponsorship requirement and has therefore been harmed.

Moreover, the factual record is sufficiently developed because the parties have stipulated to the fact that both versions of Administrative Regulation #5 require political or administrative collaboration with an authorized official and that the authorized officials have full and independent discretion to sponsor private groups and individuals, giving them access to the interior of city hall. Obviously, refusing consideration until the plaintiffs have actually sought collaboration with each and every possible collaborator in city hall would cause undue and unnecessary hardship. We therefore conclude that the challenge to the sponsorship requirement is ripe for review.

3. Mootness

Finally, the City argues that the plaintiffs' claims are moot because, following the enactment of revised Administrative Regulation #5, the city manager requested that authorized officials not schedule assemblages in the interior front lobby and stairs of city hall. Nevertheless, the plaintiffs' claims remain viable to the extent that they seek nominal damages as a remedy for past wrongs. *See Murray v. Bd. of Trustees, Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981). In addition, the City does not dispute the fact that COAST's claim remains viable because other interior areas of city hall are accessible for sponsored events under the revised version of Administrative Regulation #5.

Accordingly, we conclude that the district court properly exercised subject matter jurisdiction over the plaintiffs' action.

B. Likelihood of Success on the Merits

Under well-developed authority, federal district courts balance the following factors in addressing motions for a preliminary injunction: "(1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest will be advanced by issuing the injunction." *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009) (reviewing a preliminary injunction granted on First Amendment grounds). In this case, the defendants challenge the district court's ruling that there is a substantial likelihood that the plaintiffs will succeed on their free speech, expressive association, equal protection, and void-for-vagueness claims. On appeal, we review the grant of a preliminary injunction for abuse of discretion. *See id.* A district court abuses its discretion in this regard when it "relies upon clearly erroneous findings of fact, improperly applies the governing law, or uses an erroneous legal standard." *Id.*

1. First Amendment Free Speech Claim

The First Amendment prohibits the government from "abridging the freedom of speech." U.S. Const. Amend. I. Simply because the government may own a piece of property, however, does not mean that property is open to all types of expressive activity at all times. "[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use which it is lawfully dedicated." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). To determine the constitutionality

of a government restriction on speech on publicly-owned property, we consider three questions: (1) whether the speech is protected under the First Amendment; (2) what type of forum is at issue and, therefore, what constitutional standard applies; (3) whether the restriction on speech in question satisfies the constitutional standard for the forum. *See S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 559 (6th Cir. 2007).

a. Forum Analysis

There is no question that the plaintiffs' proposed press conference and rally are expressive activities protected under the First Amendment. The more challenging question is what kind of forum City Hall's interior constitutes. The Supreme Court has recognized three types of public fora: the traditional public forum, the designated public forum, and the limited public forum. *See Pleasant Grove v. Summum*, 129 S. Ct. 1125, 1132 (2009). A nonpublic forum, in contrast, is a government-owned property that is not by tradition or governmental designation "a forum for public communication." *Helms v. Zubaty*, 495 F.3d 252, 256 (6th Cir. 2007). The type of forum determines the applicable constitutional standard for restrictions on expressive activities. *See Summum*, 129 S. Ct. at 1132.

i. Traditional Forum

Traditional public fora include sidewalks, parks, and other areas that by "tradition or by government fiat" are open to public assembly and debate. *Helms*, 495 F.3d at 255 (quoting *Perry*, 460 U.S. at 45). Restrictions on speech in a traditional public forum receive strict scrutiny; the government may exclude a

speaker from a such a forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

If a publicly-owned property is not a traditional public forum, heightened First Amendment scrutiny is not automatic. *See id.*, 473 U.S. at 800-801. A government may, however, transform a publicly-owned property into a public forum by making it "a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 802. A government "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Id.* Governmental intent is the "touchstone" of a court's analysis in determining whether it has created a public forum. *Kincaid v. Gibson*, 236 F.3d 342, 348-349 (6th Cir. 2001) (en banc). To determine governmental intent, courts "look to the government's policy and practice with respect to the forum as well as to the nature of the property at issue and its 'compatibility with expressive activity.'" *Id.* at 349 (quoting *Cornelius*, 473 U.S. at 802).

ii. Designated Forum

The government creates a designated public forum when it opens a piece of public property to the public at large, treating as if it were a traditional public forum. *See Parks v. Finan*, 385 F.3d 694, 695-696, 699 (6th Cir. 2004) (grounds of state capitol, opened by state government for public expressive activities on a permit system, are either a traditional public forum or

designated public forum); *Church of the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278 (10th Cir. 1996) (city-owned senior center is a designated public forum because, although "not a traditional location of public debate or assembly," the city opened it "to the public for discussive purposes" by permitting "lectures and classes on a broad range of subjects by both members and non-members"). As the Supreme Court held in *Summum*, "Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum." 129 S. Ct. at 1132 (citing *Cornelius*, 473 U.S. at 802).

iii. Limited Forum

A government entity may "create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Summum*, 129 S. Ct. at 1132. In *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 102-03, 106-07 (2001), the Supreme Court held that a public school created a limited public forum when it opened its building after hours for public meetings, subject to the permission of the administration. The government may restrict speech in a limited public forum as long as the restrictions do "not discriminate against speech on the basis of viewpoint" and are "reasonable in light of the purpose served by the forum." *Id.* at 106-07; *see also Summum*, 129 S. Ct. at 1132.[1]

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[1] In *Summum*, the Supreme Court clarified that the designated public form and the limited public forum are distinct forum types and that restrictions on speech in a limited public forum receive lesser scrutiny than those in a designated public forum. 129 S. Ct. at 1132. This ruling resolves the confusion over terminology and scrutiny levels noted by this court and others after the Supreme

iv. Nonpublic Forum

By contrast, a nonpublic forum is a publicly-owned property that is not by tradition or governmental designation "a forum for public communication." *Helms*, 495 F.3d at 256. The government may limit access to a nonpublic forum "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* (quoting *Cornelius*, 473 U.S. at 806). In *Helms*, for example, we concluded that the reception area of a judge's office was a nonpublic forum despite the judge's "open-door policy" designed to accommodate individual members of the public to visit his office to speak with him. *Id.* at 256-57. The "small reception area" was only eight feet from an office suite the judge shared with several other county officials. *Id.* at 257. We held that the judge did not intend "to create a public 'forum for expressive activity'" open to "prolonged sit-ins" simply by making himself accessible to individuals seeking to discuss public matters with him. *Id.*

Court first articulated the concept of a "limited public forum" in *Good News Club*. *See Gilles v. Garland*, 281 F. App'x 501, 513 (6th Cir. 2008) (J. Moore, concurring); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004) (noting confusion about terminology and proper scrutiny levels but declining to "delve deeply into the nuances of designated versus limited public forums" because it was unnecessary to the holding); *Citizens for Community Values, Inc. v. Upper Arlington Public Library Bd. of Trs.*, 2008 WL 3843579, at *5 n.3 (S.D. Ohio 2008) (noting confusion in the Sixth Circuit and elsewhere about terminology and proper scrutiny levels).

In this case, by opening the interior spaces of Cincinnati's city hall to private groups under the aegis of Administrative Regulation #5, the City has not created a traditional public forum because the regulation does not make City Hall's interior space as open to public discourse as a sidewalk or park. Nor does the regulation allow the City to treat that space as a designated public forum. Instead, Administrative Regulation #5 has created, at most, a limited public forum like that described in *Good News*. Moreover, even if we were persuaded by the City's argument that the regulation, as revised, creates only a nonpublic forum,[2] the result would be the same, because

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[2] The City argues that under the Supreme Court's ruling in *Ysursa v. Pocatello Educational Association*, 129 S. Ct. 1093, 1098 (2009), government restrictions on speech in nonpublic fora receive only rational basis review and need not be viewpoint-neutral. We reject this argument because the Court's reasoning in *Ysursa* is entirely unrelated to forum analysis. In that case, the Court upheld Idaho's decision to ban local government employers from allowing union payroll deductions for political purposes against a First Amendment challenge. *See id.* at 1097-98. The Court observed that the state is "not required to assist others in funding the expression of particular ideas, including political ones," and noted that a state's decision not to do so by permitting payroll deductions "is not an abridgement of the union's speech" but, rather, the state's refusal to be enlisted in support of the union's speech activities. *Id.* at 1098. Because a government's "decision not to subsidize the exercise of a fundamental right does not infringe the right," the court applied rational basis review to plaintiff's claim. *Id.*

The Court's opinion in *Ysursa*, however, has no bearing on the scrutiny level applicable to Administrative Regulation #5, because the *Ysursa* Court did not engage in forum analysis in order to resolve the First Amendment dispute in that case. Hence, we reject the City's attempt to characterize COAST's request to

government limitations on speech in both a limited public forum and a nonpublic forum receive the same level of scrutiny. In both instances, any restrictions must be "reasonable and viewpoint neutral." *Summum*, 129 S. Ct. at 1132; *see also Helms*, 495 F.3d at 256.

Because the requirement of sponsorship or collaboration in this case is facially viewpoint neutral, the remaining issue is whether the requirement is reasonably related to the purpose of the forum. The stated purpose of the forum is to allow city officials to exercise their rights and responsibilities under the City Charter. But, Administrative Regulation #5 permits authorized officials to open spaces in city hall to private parties for events that they do not attend or assist in organizing. As a result, the sponsorship or collaboration requirement, as drafted, bears little relationship to any official duties under the City Charter. We therefore hold that the district court did not abuse its discretion in concluding that plaintiffs have shown a likelihood of success on the merits of their facial First Amendment challenge to the sponsorship requirement under the public forum doctrine.

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access city hall for its rally as a request that the City subsidize its political speech by providing space. Of course, the City could altogether close the interior spaces of city hall to expressive activities by private groups if it chose to do so. The City, however, maintains a policy permitting private groups to engage in speech activities in City Hall with the discretionary sponsorship of authorized officials. As long as this policy exists, forum analysis applies.

b. Governmental Speech

On appeal, the City raises for the first time an argument that events inside city hall are exempt from First Amendment scrutiny altogether because they represent "government speech." This claim arises from the Supreme Court's recent decision in *Pleasant Grove v. Summum*, a 2009 opinion that was released after the district court issued the preliminary injunction and the City filed its notice of appeal. *See* 129 S. Ct. 1125, 1132 (2009). We conclude that this argument fails on its merits.

In *Summum*, a public park erected a donated Ten Commandments monument but rejected a monument representing another religious organization's tenets. *Id.* at 1129-30. The court found no constitutional violation, holding that the First Amendment "does not regulate government speech," and that a government entity is entitled to "select the views that it wants to express." *Id.* at 1131. In so holding, however, the court affirmed that "[w]hile government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property." *Id.* at 1132. In concluding that the Ten Commandments monument was government speech rather than private speech on government land, the court noted that "[g]overnments have long used monuments to speak to the public" and that the public reasonably interprets "privately financed and donated monuments that the government accepts and displays to the public on government land" as conveying the government's views. *Id.* at 1133. *See also ACLU v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006) (holding that a "Choose Life" license plate is government speech for First Amendment purposes because "the

government determines [the] overarching message and retains the power to approve every word disseminated") (citing *Johanns v. Lifestock Mktg. Ass'n*, 544 U.S. 550, 560-61 (2005)).

Under the Court's reasoning in *Summum*, the activities that take place in Cincinnati's city hall are not "government speech." Although government speech may involve private individuals, the connection between the events that take place inside city hall under Administrative Regulation #5 and any official government views is simply too attenuated. As we have noted, sponsoring city officials need not be involved directly in the activities that take place in city hall. Moreover, no one can reasonably interpret a private group's rally or press conference as reflecting the government's views simply because it occurs on public property. Historically, governments have exercised strong "editorial control over donated monuments," *Summum*, 129 S. Ct. at 1133, while private individuals can apparently access the interior of Cincinnati's city hall for assemblages on the whim of any authorized official.

Thus, we conclude that the doctrine of government speech does not prevent applying First Amendment scrutiny in this case.

2. First Amendment Expressive Association Claim

The district court held that the plaintiffs have shown likely success on their claim that the sponsorship requirement violates the First Amendment right of expressive association. Applying strict scrutiny, the district court reasoned that in

requiring collaboration with city officials, "Administrative Regulation #5 forces groups, such as COAST, to accept members it does not desire" and concluded that "there are means significantly less restrictive of associational freedoms by which Defendants could control the use of the interior of City Hall." The City argues that the district court erred because that Administrative Regulation #5 does nothing to interfere with COAST's membership. We agree.

The First Amendment extends beyond the right to speak to encompass the "right of expressive association," *i.e.*, the "right to associate for the purpose of speaking." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006). The right protects "a group's membership decisions" and also protects against laws that make "group membership less attractive" without "directly interfer[ing] with an organization's composition," such as requiring groups to disclose their membership lists or imposing penalties "based on membership in a disfavored group." *Id.* at 69 (citing *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101-02 (1982); *Healy v. James*, 408 U.S. 169, 180-84 (1972)). "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

In analyzing an expressive association claim, courts use a three-step process. The first determination is whether a group is entitled to protection. *See id.* at 655. A group need not associate "for the 'purpose' of

disseminating a certain message" to be protected; it is enough that a group "engage[s] in expressive activity that could be impaired." *Id.* Political advocacy groups like COAST are the paradigmatic expressive associations entitled to protection. Second, courts ask whether the government action in question "significantly burden[s]" the group's expression, affording deference "to an association's view of what would impair its expression." *Id.* at 653. Lastly, the government's interest in any restriction must be weighed against plaintiff's right of expressive association. *See id.* at 656.

A government action does not interfere with the right of expressive association unless it directly or indirectly interferes with group membership. In *Forum for Academic & Institutional Rights*, the Supreme Court held that requiring law schools to allow military recruiters on campus as a condition of receiving federal funds did not significantly burden associational rights because "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students." 547 U.S. at 69. The statute at issue, therefore, did not "force a law school 'to accept members it does not desire.'" *Id.* The right of expressive association does not shield groups from mere "interaction" with non-members, and a group cannot invoke it simply by claiming interaction "would impair its message." *Id.* (quoting *Dale*, 530 U.S. at 653).

In this case, the plaintiffs' expressive association claim fails because nothing in Administrative Regulation #5 affects the internal membership decisions of groups seeking to use city hall for expressive activities. Officials who "sponsor" or

"collaborate" with groups to use the interior spaces do not become members of the group – they are outsiders with whom groups must interact only for the limited purpose of accessing the city hall space. Indeed, Administrative Regulation #5 requires so little interaction that the sponsoring official apparently need not help organize or even attend a sponsored event. Administrative Regulation #5, therefore, does not "significantly burden" COAST's constitutional right of association, and the district court erred in concluding that the plaintiffs' expressive association claim is substantially likely to succeed.

3. Equal Protection Claim

The district court also concluded that the plaintiffs had shown likely success on their equal protection claim. Applying strict scrutiny, the district court held that Administrative Regulation #5 was not narrowly tailored to effect a compelling government interest. On appeal, the defendants argue that the district court erred in applying strict scrutiny and that plaintiffs have no cognizable equal protection claim. We agree.

The Equal Protection Clause "protects against invidious discrimination among similarly situated individuals or implicating fundamental rights." *Scarbrough v. Morgan City Bd. of Ed.*, 470 F.3d 250, 260 (6th Cir. 2006). "The threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Id.* Strict scrutiny is appropriate only if a classification "infringes on a class of people's fundamental rights [or] targets a member of a suspect class." *Id.*

Neither the plaintiffs nor the district court provide more than cursory analysis of why plaintiffs' equal protection claim should receive strict scrutiny. The classification at issue is, presumably, those groups who collaborate with authorized officials to access city hall and those who do not. But because such "collaborators" and "non-collaborators" are not suspect classifications, strict scrutiny is appropriate only if the classification infringes on fundamental rights.

We conclude that strict scrutiny is inapplicable in this case. The sponsorship requirement under Administrative Regulation #5 is minimal because an official need not be actively involved with an event to sponsor it. Under the public forum doctrine described above, government officials may open publicly-owned spaces to "certain groups or for the discussion of certain topics." *Good News Club*, 533 U.S. at 106-07. Granting access to one group and not another inevitably involves classification – those invited into the forum and those who are not. The forum analysis applied above assumes such classification but does not extend strict scrutiny to limited public fora and nonpublic fora. The appropriate First Amendment standard in this case is viewpoint neutrality and rational relationship to the purpose of the forum, not strict scrutiny. *Id.*

Thus, the district court erred in applying strict scrutiny to determine whether plaintiffs had shown a likelihood of success on their equal protection claim.

4. Void-For-Vagueness Claim

The district court concluded that COAST has shown a substantial likelihood of success on its claim

that Administrative Regulation #5 is unconstitutionally vague. We agree.

In pursuing a void-for-vagueness claim, a plaintiff must establish to a court's satisfaction that "[a regulation's] prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion." *United Food & Commercial Workers Union Local 1099 v. Southwest Ohio Regional Transit Auth.*, 163 F.3d 341, 358-59 (6th Cir. 1998) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The void-for-vagueness doctrine not only ensures that laws provide "fair warning" of proscribed conduct, but it also protects citizens against the impermissible delegation of basic policy matters "for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *UFCW*, 163 F.3d at 358-59 (citing *Grayned*, 408 U.S. at 108-109). Without "clear standards guiding the discretion of public officials" with enforcement authority, there is a risk that those officials will "administer the policy based on impermissible factors." *UFCW*, 163 F.3d at 358-59. As a result, laws or regulations that, for example, give officials "unbridled discretion over a forum's use" are impermissible because of the "danger of censorship and of abridgement of our precious First Amendment freedoms." *Id.* A statute that fails to constrain "an official's decision to limit speech" with "objective criteria" is unconstitutionally vague. *Id.*

In *UFCW*, for example, we held that a policy governing the selection of advertisements for city busses was unconstitutionally vague on its face. *Id.* at 363. The policy prohibited "controversial"

advertisements and required those selected to be "aesthetically pleasing" without any further guidance as to the meaning of these criteria. *Id.* at 359-60. We held that these terms were so vague that they gave officials "the power to deny a proposed ad that offends the officials' subjective beliefs and values under the guise that the ad is aesthetically displeasing [or controversial]." *Id.* at 360. Because of this "danger of arbitrary and discriminatory application," the court in *UFCW* found that the plaintiff's due process challenge was substantially likely to succeed on the merits. *Id.*

In this case, Administrative Regulation #5 provides even less guidance to officials than the advertising policy in *UFCW*. The parties stipulate that the revised version of Administrative Regulation #5, as did the original, gives complete discretion to council members and department heads to select whom they will sponsor. The only direction provided is that the purpose of the interior of city hall is to allow City officials "to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati." Without further specificity, this directive offers no meaningful guidance. We conclude that the plaintiffs have established a substantial likelihood of success with regard to the merits of their void-for-vagueness claim.

III. CONCLUSION

Because the plaintiffs have established a substantial likelihood of success on their free speech and void-for-vagueness claims, there appears to be no issue as to the existence of the remaining preliminary injunction factors. As we have previously noted, "even minimal infringement upon First Amendment values

constitutes irreparable injury sufficient to justify injunctive relief." *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989). When a constitutional violation is likely, moreover, the public interest militates in favor of injunctive relief because "it is always in the public interest to prevent violation of a party's constitutional rights." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).

We therefore conclude that the district court properly enjoined enforcement of Administrative Regulation #5 on the basis of the plaintiffs' free speech and void-for-vagueness claims. On these grounds, we AFFIRM the order of the district court and REMAND the case for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-4679

[Filed September 24, 2010]

MARK MILLER; COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES; and WEDEMANDAVOTE.COM, Plaintiffs - Appellees,	)
v.	)
CITY OF CINCINNATI; MILTON R. DOHONEY; and JOEL KOOPMAN, Defendants - Appellants.	)

Before: DAUGHTREY, COLE, and GIBBONS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the order of the district court is AFFIRMED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:08cv550

[Filed November 19, 2008]

Mark Miller, *et al.*,	)
	)
Plaintiff,	)
	)
v.	)
	)
City of Cincinnati, *et al.*,	)
	)
Defendants.	)
	)

Judge Michael R. Barrett

OPINION & ORDER

This matter is before the Court upon Plaintiffs' Motion Preliminary Injunction. (Doc. 2) Also before the Court is Defendants' (1) Motion to Dismiss the First Amended Complaint (Doc. 19); (2) Motion to Dismiss the Second Amended Complaint (Doc. 24); Motion in *Limine* to Exclude Plaintiffs' Expert (Doc. 25); and Motion to Strike the Affidavit of Plaintiffs'

Proposed Expert (Doc. 37). The Court held a hearing on this matter on October 22, 2008. (Doc. 36)

I. BACKGROUND

Plaintiffs are an individual and two organizations who oppose the authority of the City Council to implement an automated photo-monitoring program to enforce violations of traffic laws and support the use of a system of proportional representation to elect City Counsel. (Doc. 22, ¶¶3-7) Plaintiffs also intend to engage in advocacy in the future regarding taxing and spending issues before the City of Cincinnati. (Id. ¶ 6) Plaintiffs bring this action in their own right and on behalf of a proposed class.[1] (Id. ¶ 77)

On April 28, 2008, Plaintiffs submitted a letter to Defendant Milton Dohoney, the City Manager of the City of Cincinnati. (Id. ¶¶ 9, 23 & Ex. C) Plaintiffs requested the use of the lobby and stairs inside City Hall for a press conference and rally. (Id.) This location was previously used for a rally on February 27, 2008 by the supporters of a tax levy for the Cincinnati Public Schools. (Id. ¶17) Participants and speakers

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[1] Plaintiffs seek to certify the following class:

> Class No. 1: All individuals or organizations that wish, now or in the future, to conduct a press conference, rally or to engage in any other Communicative Activity in a Public Space inside of Cincinnati City Hall on any issue of public importance that affects the City of Cincinnati and to do so without having to obtain the sponsorship and blessing of a City-connected official or being subjected to any administrative regulation that places unfettered discretion in a City-connected official to grant permission for such press conference or rally.

included representatives from Parents for Public Schools of Greater Cincinnati, Cincinnatians Active to Support Education, the AMOS Project, and the Baptist Ministers Conference of Cincinnati and Vicinity. (Id. ¶18, 20-21 & Exs. A, B) These organizations are independent from the City of Cincinnati. (Doc. 28, ¶ 8)[2]

In a letter dated April 29, 2008, Defendant Joel Koopman, employed in the City's Division of Facility Management, responded to Plaintiffs' request. (Doc. 22, Ex. D) Koopman stated that Administrative Regulation #5 governs the use of all City buildings, offices and City workplaces. (Id.) The Regulation in effect at that time provided, in relevant part:

> No private business enterprises or solicitations should be permitted in City buildings or operated therefrom. Exceptions should be made only by specific approval of the Department Head when it is judged to be in the public interest, as in the case, for example, of the United Way Campaign.
>
> . . .
>
> In making any exceptions to the above policies, Department Heads are urged to consider not only what is proper, but also how it appears to the public.

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[2] In addition, it was discussed at hearing on the preliminary injunction that the Cincinnati Public Schools are governed by the Cincinnati Public Schools Board, not City Council or the City Manager.

(Id.) Koopman explained that the intent of Administrative Regulation #5 is that "the use of any City facility is for conducting business related to the functions of our various departments in serving the citizens and by City Council in the performance of their duties." (Id.) Koopman also explained that: "City Facility Management's practice is that events held inside the building require a City sponsor, either a Council Member or a department as part of their regular business and duties." (Id.) Koopman closed by stating: "Should you contact one of the City departments or one of the Council Members and find agreement to sponsor this press conference and rally inside City Hall, we will gladly work with them to make this happen." (Id.). Instead of conducting the press conference and rally inside, Plaintiffs held their event outside City Hall ("the May 2008 Rally"). (Id. ¶ 25; Doc. 22, Ex. Z)

On June 9, 2008, an independent organization, Citizens for Community Values ("CCV"), held a press conference in a large conference room inside City Hall. (Id. ¶ 27 & Ex. E) At the conference, the coalition called upon a local weekly newspaper to stop publishing advertisements for adult businesses. (Id. ¶ 28) Speakers included a former City Councilmember who is a member of CCV, a former Justice Department official, and the director of another independent organization, Stepping Out 24/7 Ministries. (Id. ¶ 29)

On July 17, 2008, Plaintiffs submitted a second request to the City seeking use of the lobby and stairs inside City Hall for a second rally and press conference. (Id. ¶ 33 & Ex. F) Plaintiffs' request explains that the purposes of the rally and press conference would be to announce the results of the red

light camera petition effort. (Id., Ex. F) Koopman again responded by explaining that"[e]vents that do not have sponsorship from a City Department, the City Manager, a Council Member or the Mayor are welcome to use the exterior stairs since it is a public plaza. . . . If you should acquire sponsorship from one of the above parties, please inform us so arrangements can be made for use of the interior steps" (Id. ¶ 40 & Ex. G)

On August 6, 2008, the City Council defeated an ordinance submitted by the City Manager's Office that selected a vendor for the red light camera proposal. (Doc. 28, ¶ 62)

On August 19, 2008, this Court entered a Temporary Restraining Order which enjoined Defendants from applying Administrative Regulation #5 to requests for use of the lobby and stairs inside City Hall. (Doc. 8) The Court ordered further that no sponsored or unsponsored activities shall take place in the lobby and stairs inside City Hall except for routine ingress and egress during the pendency of the Temporary Restraining Order. (Id.) The Court found that Plaintiffs were entitled to relief because they had shown a likelihood of success on the merits of their Due Process claim. The Court found that Plaintiffs had not shown a likelihood of success on the merits of their First Amendment or Equal Protection claim.

Plaintiffs held their second rally on the stairs outside City Hall ("the August 20, 2008 rally"). (Doc. 22, Ex. Z)

Subsequent to the granting of the TRO, on September 9, 2008, the City revised Administrative

Regulation #5. The current Administrative Regulation #5 provides:

> Interior of City Hall
>
> City Hall is lawfully dedicated for the purpose of allowing City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati. . . .
>
> The interior spaces of City Hall are reserved for use by the Mayor, City manager and is assistants, City Councilmemers, City Department Directors, City Commissioners and Boards, and City employees. The interior of City Hall is open to the public for purposes of visiting City offices and attending City Council and other public meetings, The interior of City Hall is not generally available to the public for other purposes.
>
> When the Mayor, City Manager and his assistants, City Councilmembers, City Department Directors, and City Commissions and Boards intend to use interior spaces of City Hall for assemblages, they should notify the Facilities Management Division of the Public Services Department. That notice should be provided as far in advance of the intended use as reasonably practicable.
>
> Facilities Management is responsible for insuring that the assemblage does not create security problems, unreasonably interfere with ingress or egress from City Hall, or otherwise

> unreasonably interfere with the other official uses occurring inside City Hall.

(Doc. 22, Ex. H)

City Hall Chambers and a community room on the third floor of City Hall are subject to the Rules of Council, not Administrative Regulation #5. (Doc. 28, ¶ 2 & Ex. D) The Rules of Council provide:

> The council chamber and community room shall be under the supervision and control of the clerk of council when the council is not in session. Except as herein provided they shall be used solely by the council and its committees for the transaction of public business of the city. If not required for such use, the clerk may permit their use for the transaction of other public business. Application for such use must be made to the clerk of council. Any permission granted may be canceled or revoked by the clerk forthwith where necessary for the protection of city property, the preservation of order, the transaction of public business of the city, or other sufficient reason.

(Id.)

On September 22, 2008, Plaintiffs filed a Second Amended Complaint. Plaintiffs sought to hold a political rally in support of two ballot issues in this November's election: (1) a proposal to restrict the ability and authority of the Council of the City of Cincinnati to implement an automated photo-monitoring program to enforce claimed violations of City traffic laws; and (2) the use of a system of

proportional representation to elect the Cincinnati City Council. (Doc. 22) Plaintiffs sought to use the areas inside Cincinnati City Hall, including the inner front lobby and first floor staircase on the Plum Street side of City Hall, various conference rooms, the basement lunchroom in City Hall, and the Council Chambers in City Hall. (Id.)

In preparation for the hearing on the preliminary injunction, the parties conducted discovery and entered into a number of stipulations of fact for purposes of the hearing. The parties have submitted calendars maintained by the City for the use of certain spaces in City Hall. (Doc. 28, ¶ 6)[3] While the calendars are not complete, the dates range from February 3, 1997 to the present. (Id.)

The calendars show that the lobby and first floor staircase have been used for (1) the school tax levy rally; (2) occasional annual rallies for charitable City-sponsored giving campaigns (specifically, the United Way, United Negro College Fund, Community Shares and Fine Arts Fund); (3) tables for United Way and Fine Arts Fund solicitations during the respective City charitable giving campaigns; (4) the display of the piece of art entitled "The Memorial of Our Lost Children," comprised of shoes, toys and other items that belonged to murdered children; (5) an annual Christmas tree display and other holiday decorations; (6) another rally and press conference between 2000 and 2004 involving the Cincinnati Public Schools tax levy. (Id. ¶ 7)

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[3] The parties stipulated that these events took place as well.

The calendars show that the basement lunchroom has been used for monthly meetings of the City's Department of Transportation and Engineering's Bike/Pedestrian Advisory Committee, and on May 9, 2006 American Bicyclists held a Bicycle Commuter Course presentation as part of the Bike/Pedestrian Advisory Committee meeting. (Id.)

The calendars show that conference room number 115 has been used for (1) a prize drawing for employee contributors to the Fine Arts Fund during the City's Fine Arts Fund campaign; (2) meetings of Keep Cincinnati Beautiful, a City contractor; (3) meeting of SEEPAC; (3) board meeting and luncheon of American Society for Public Administrators (4) press conference with Councilmember Todd Portune about bringing a professional women's soccer team to the area; (5) a meeting of the Soccer Committee, requested by Karen Ball of Councilmember Todd Portune's office; (6) a meeting of International Visitors Council, requested by City Manager's Office employee Gina Ruffin; (7) meetings for International City/County Management Association held by former City Manager during its annual convention in Cincinnati in 2000; (8) a fundraiser by a Water Works employee; (9) United Way meetings requested by Shirley Dunham of Councilmember Crowley's office and City's Public Information Officer Meg Olberding; (10) "A Taste of City Hall" fundraiser for United Negro College Fund Drive; (11) press conference requested by Department of Community Development employee Velda Boyd; (12) a Hamilton County Convention Facilities Authority meeting; (13) a meeting of EITC Partnership/ Make Work Pay, requested by Councilmember Pepper; (14) a meeting of EITC Partnership/Make Work Pay, requested by

Councilmember Pepper; (15) an Office of National Drug Policy press; (16) the City's Fine Arts Fund Campaign kickoff; (16) a Kids Voting seminar on local government, requested by Councilmember Monzel; (17) the Mayor's annual Youth in City Government program; (18) a speech by American Idol celebrity Randy Jackson about heart health, requested by Councilmember Berding; and (19) a speech by Ohio Department of Corrections Director Terry Collins about the campaign "Who killed our kids?," requested by Mayor Mallory. (Id.)

The calendars show that conference room number 169 has been used for (1) a meeting of Keep Cincinnati Beautiful; (2) a Hamilton County Convention Facilities Authority orientation meeting; and (3) an Earned Income Tax Credit meeting, requested by Carla Walker of the Mayor's office. (Id.)

The calendars show that the Council Chambers and Committee Room have been used for (1) a Cincinnati Teen Court mock trial program, requested by Councilmember Cole; (2) a Youth Recognition Ceremony, requested by Councilmember Thomas; a United Way campaign event; (3) a Green & Healthy Schools meeting; (4) Truman Scholarship interviews, as requested by Councilmember Cranley; (5) the Mayor's Concert Series; (6) an event for the City's United Way Campaign, requested by Councilmember Berding; (7) a meeting for SORTA, requested by Councilmember Bortz; (8) Government Day, hosted by the Greater Cincinnati Chamber of Commerce; (9) sessions for the Leadership Cincinnati program, arranged by the City Manager's Office. (Id.)

The parties stipulate that under both versions of Regulation #5, in order for independent individuals and organizations to participate in a rally and press conference inside of City Hall, such individuals would need to politically or administratively collaborate with the Mayor, a member of the Cincinnati City Council, the City Manager and his assistants, a City Department Director, or a City Board or Commission. (Id. ¶ 18)[4] The parties stipulate further that because of the requirement for political or administrative collaboration with City officials, it was and remains possible that advocates of one position, *e.g.*, the "Yes" position, on a ballot issue, could participate in a rally or press conference inside City Hall, and advocates of the opposite viewpoint, *e.g.*, the "No" position on the same ballot issue, could not participate in a similar rally or press conference inside City Hall unless those advocating such opposite viewpoint could also politically or administratively collaborate with one of the aforementioned individuals. (Id.)[5] The parties stipulate that under either the previous or current version of Administrative Regulation #5 the "sponsor" of an event is able to use his or her full and independent discretion in determining whether to

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[4] The parties stipulate that there is no difference in the procedure to be followed under the past and current version of Regulation #5 for an independent person or organization to try to achieve political or administrative collaboration with a City official for purposes of conducting an assemblage inside City Hall. (Id. ¶ 22)

[5] The parties stipulate that the sponsor of an event could allow the use of such areas for an event or assemblage in support of or in opposition to issues appearing on the ballot at a forthcoming election. (Id. ¶ 16)

sponsor such use. (Doc. 28, ¶ 17)[6] Finally, the parties stipulate that under either version of Administrative Regulation #5, the sponsor of an event does not necessarily need to attend the event. (Id. ¶ 14)

Plaintiffs claim that the City's policy regarding the use of the interior of City Hall violates the First and Fourteenth Amendments to the United States Constitution in that it (i) constitutes an invalid prior restraint on speech, (ii) allows arbitrary and capricious suppression of protected speech, (iii) is vague; (iv) is overbroad; (v) permits municipal administrators to make standardless decisions based on their own excessive and unfettered discretion about which speech should be permitted and which should not, and (vi) allows content and viewpoint censorship of speech that can easily be used to prevent expression of a particular point of view, (vii) denies the equal protection rights of Plaintiffs and others and (viii) denies the due process rights of Plaintiffs. Plaintiffs have also brought a claim based upon a violation of their freedom of association.[7] Plaintiffs' claims are brought pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Plaintiffs seek declaratory relief, a preliminary and permanent injunction, nominal damages, and attorney fees.

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[6] The Court notes under the Rules of Council, the clerk of council grants or denies permission for use of Council Chambers when not in use by Council.

[7] The parties' discussion of this claim has been limited. Plaintiffs argue in a footnote in their Supplemental Brief in support of the Motion for Preliminary injunction that their freedom of expressive association is at issue.

II. ANALYSIS

A. Motion to Dismiss

Defendants argue that this Court lacks jurisdiction because Plaintiffs' claims are not ripe and Plaintiffs lack standing. Federal Rule of Civil Procedure 12(h)(3) instructs this Court to dismiss an action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." Defendants also argue pursuant to Federal Rule of Civil Procedure 12(b)(6) that Plaintiffs have failed to state a claim.

1. First Amended Complaint

Defendants filed their Motion to Dismiss the First Amended Complaint (Doc. 19) before Plaintiffs filed their Second Amended Complaint. The general rule is that an amended pleading supersedes the original and remains in effect, unless again modified, from that point forward. *Hartman v. Register*, 2007 WL 915193, *5 (S.D.Ohio March 26, 2007) (unpublished), *citing* 6 Wright, et al., Federal Practice & Procedure § 1476, at 556-57 (2nd ed. 1990 & Supp. 2001). Once an amended pleading is filed, the original pleading no longer performs any function in the case. *Id.* Accordingly, Defendants' Motion to Dismiss the First Amended Complaint is DENIED as MOOT. The Court will, however, consider arguments contained within the Motion to Dismiss the First Amended Complaint to the extent that they are incorporated by reference in Defendants' Motion to Dismiss the Second Amended Complaint (Doc. 24).

2. Standing

Standing is a jurisdictional matter and is a threshold question to be resolved by the court before a court may address any substantive issues. *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987). To establish standing, a plaintiff must show: (1) that he or she suffered an injury in fact, which is both concrete and actual or imminent; (2) that the injury is caused by the defendant's conduct; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In addition, "[p]rudential limitations dictate that 'the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted.'" *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 403 (6th Cir. 1999), *quoting Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576 (6th Cir. 1991).

Defendants argue that Plaintiffs have not suffered an injury in fact because they have not sought a City sponsor for their press conference and rally, either under the previous or current version of Administrative Regulation #5.

Plaintiffs shown an injury in fact based on Defendants' denial oftheir request to hold their press conference and rally inside the lobby and stairs of City Hall. In addition, the Supreme Court has "long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a

license. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-756 (1988). The Supreme Court has explained that there are "two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *Id.* at 759. "Therefore, a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.*

Here, the parties have stipulated that under Administrative Regulation #5 the sponsor of an event is able to use his or her full and independent discretion in determining whether to sponsor such use. Plaintiffs allege that as a result, City officials have unbridled discretion in determining who is permitted to conduct events inside City Hall. Therefore, a facial challenge is appropriate, and Plaintiffs have standing to bring their claims against Defendants.

3. Ripeness

To determine whether a claim is ripe, this Court must consider (1) the likelihood that the injury alleged by the plaintiff will ever occur; (2) whether the factual record is sufficiently developed to allow for adjudication; and (3) the hardship to the parties from refusing consideration. *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002). However, this ripeness analysis "is somewhat relaxed in the First Amendment context." *Lawrence v. Welch*, 531 F.3d 364, 374 (6th

Cir. 2008), *quoting Norton*, 298 F.3d at 554; *see also Currence v. City of Cincinnati*, 2002 WL 104778, *3 (6th Cir. Jan. 24, 2002) (unpublished) ("Ripeness analysis is relaxed for the First Amendment cases involving a facial challenge to a regulation because courts see a need to prevent the chilling of expressive activity."), *citing Bill Richardson v. Gonzales*, 64 F.3d 1495, 1500 (10th Cir. 1995).

Plaintiffs have shown that it is likely that the alleged injury will occur because on two previous occasions Defendants have denied Plaintiff's request to use the interior of City Hall because Plaintiffs did not have a sponsor for their event.[8] Next, the factual record is sufficiently developed to allow for adjudication. There are very little, if any, disputed facts, and this case largely turns on issues of law. *See Currence*, 2002 WL 104778, at *3. The central dispute is whether the Administrative Regulation #5 violates the Constitution by requiring a sponsor for an event held inside City Hall. Finally, it is clear that if this Court refuses consideration, Plaintiffs will not know if they will be permitted to hold future events inside City Hall, thereby creating an undue hardship. Therefore, the Court concludes that Plaintiffs' claims are ripe for adjudication.

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[8] However, the Court finds that any challenge Plaintiffs bring based upon Defendants "selectively and discriminatorily" allowing access to specific interior spaces (See Doc. 33, at 6) is not ripe. Plaintiffs did not seek sponsorship of their event, therefore their challenge can only be based upon the constitutionality of the sponsorship requirement itself.

4. Mootness

Defendants have argued that Plaintiffs' claims are moot because Administrative Regulation #5 has been amended. However, based on the stipulations of the parties, it appears that the current version of Administrative Regulation #5 is no different from Defendants' interpretation and application of the previous Administrative Regulation #5 in that independent individuals and groups must find a sponsor to hold an event inside City Hall. Moreover, because nominal damages are a symbolic remedy for past wrongs, a prayer for nominal damages precludes a finding of mootness, even when the defendant has altered or abandoned the allegedly unconstitutional policy forming the basis for the plaintiff's complaint. *Murray v. Bd. of Trs., Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981) (remanding First Amendment case to district court for adjudication of plaintiff's nominal-damage claim); *see also Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 387 (6th Cir. 2005) (explaining that "even if [the plaintiff's] matriculation from middle school to high school mooted the claim for injunctive and declaratory relief (a point we need not decide), the existence of a damages claim ensures that this dispute is a live one and one over which Article III gives us continuing authority"). Therefore, the Court concludes that Plaintiffs' claims are not moot.

5. Failure to state a claim

In reviewing a motion to dismiss for failure to state a claim, this Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Bassett v. National Collegiate*

Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008), *quoting Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). However, the factual allegations contained in a complaint must "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct 1955, 1965 (2007).

Plaintiffs bring claims for violations of the First and Fourteenth Amendments. Plaintiffs claim that the City has created a limited or designated forum inside City Hall based on the types of events held there. Plaintiffs claim that even if the areas inside City Hall at issue are nonpublic fora, Administrative Regulation #5 is unconstitutional because it is a prior restraint on speech, and is overbroad and vague. Specifically, Plaintiffs allege that the sponsorship requirement of Administrative Regulation #5 violates their right to free speech. Plaintiffs further claim due process and equal protection violations based upon the free speech violations. The Court finds the allegations in Plaintiffs' Second Amended Complaint are sufficient to state a claim for violations under the First and Fourteenth Amendments. Based on the foregoing, the Court DENIES Defendants' Motion to Dismiss.

B. Motion *in Limine* and Motion to Strike

Defendants argue that this Court should preclude Plaintiffs from introducing the testimony of their proposed expert, Mark Weaver. Because Weaver's testimony was not presented at the hearing on the preliminary injunction, the Court hereby DENIES AS MOOT Defendants' Motion in Limine.

However, Plaintiffs have presented Weaver's affidavit in support of their motion for preliminary

injunction. Defendants seek an order striking that affidavit pursuant to Federal Rules of Evidence 403 and 702 because Weaver's testimony does not meet the *Daubert* requirements, embraces legal conclusions, does not assist the trier of fact, and the probative value of the testimony is substantially outweighed by the danger of unfair prejudice.

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

An expert witness is generally prohibited from testifying on issues of law. *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994) ("Although an expert's opinion may embrace an ultimate issue to be decided by the trier of fact, Fed.R.Evid. 704(a), the issue embraced must be a factual one."). However, this prohibition is not applicable where the court is sitting as both a trier of fact and law. *See Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for Western Dist. of Mich.*, 46 F.Supp.2d 689, 694 (W.D.Mich. 1999) (finding that expert's affidavit properly provides evidence of a factual nature that is not barred by Rules 702 or 704; and the court, sitting

as both trier of fact and of law on a motion for preliminary injunction, is fully able to disregard the implication of any impermissible legal conclusion); *Knisley v. U.S.*, 817 F.Supp. 680, 690 (S.D.Ohio 1993) (finding that any possible concern over invasion of the judge-jury relationship is not present in cases tried to the bench). Accordingly, in deciding the motion for preliminary injunction, the Court finds it unnecessary to strike Weaver's affidavit under Federal Rule of Evidence 702.

Federal Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Like Federal Rule of Evidence 702, Rule 403 has no application where the court sits as both trier of fact and law. In the context of a bench trial, the application of the unfair prejudice portion of Rule 403 has been seen as an unnecessary and "useless procedure." *U.S. v. Hall*, 2000 WL 32010, *2 (6th Cir. Jan. 4, 2000) (unpublished), *citing* 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5213 (1978 & Supp 1999) ("Since the judge must hear the evidence in ruling on the motion to exclude the evidence under Rule 403, exclusion of the evidence on grounds of prejudice in a bench trial is described as a 'useless procedure.' "); *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) (finding court should not exclude evidence under Rule 403 in bench trial on grounds of unfair prejudice); *Gulf States*

Utilities Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir.1981) (finding unfair prejudice portion of Rule 403 "has no logical application to bench trials"). While the Court questions the relevance of the information in Weaver's affidavit, the Court finds that it need not be excluded under Federal Rule of Evidence 403. Accordingly, Defendants' Motion to Strike the Affidavit of Plaintiffs' Proposed Expert is DENIED.

C. Preliminary injunctive relief standard

Under Federal Rule of Civil Procedure 65, injunctive relief is an extraordinary remedy whose purpose is to preserve the *status quo*. In when determining whether to grant or deny a preliminary injunction, this Court must consider four factors: (1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. *Chabad of S. Oh. & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004), *quoting Blue Cross & Blue Shield Mut. of Ohio v. Columbia/HCA Healthcare Corp.*, 110 F.3d 318, 322 (6th Cir. 1997). In First Amendment cases, the first factor will often be determinative. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001), *citing Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).

C. Section 1983

Section 1983 creates no substantive rights, but merely provides remedies for deprivations of rights established elsewhere. *Tuttle v. Oklahoma City*, 471 U.S. 808 (1985). Section 1983 has two basic requirements: (1) state action that (2) deprived an individual of federal statutory or constitutional rights. *Flint v. Kentucky Dept. of Corrections*, 270 F.3d 340, 351 (6th Cir. 2001), *citing Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir.1998) *and United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 33 (6th Cir.1992). There appears to be no dispute that Plaintiffs have shown state action. Instead, Defendants argue Plaintiffs have not made an adequate showing of a constitutional violation.

D. First Amendment

The First Amendment prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I. The First Amendment, however, does not guarantee that all forms of protected speech may be heard on property owned or controlled by the government. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Instead, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.*

To determine whether the government has violated an individual's free speech rights, the Sixth Circuit employs a three-step analysis: (1) we ask whether the speech is protected under the First Amendment; (2) if so, using the public-forum doctrine, we ascertain whether the applicable forum is public or nonpublic;

and (3) applying the appropriate standard for the forum, we ask whether the government's prohibition on speech passes muster under the First Amendment. *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 559 (6th Cir. 2007).

1. Protected speech

The parties agree that the proposed speech–a press conference and rally–is protected speech under the First Amendment.

2. Nature of the forum

There are three types of public fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Jobe v. City of Catlettsburg*, 409 F.3d 261, 266 (6th Cir. 2005), *citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

"A traditional public forum is a place 'which by long tradition or by government fiat has been devoted to assembly and debate,' such as a street or a park." *Kincaid v. Gibson*, 236 F.3d 342, 348 (6th Cir. 2001), *quoting Perry*, 460 U.S. at 45. The government can exclude a speaker from a traditional public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800.

The second type of forum has been alternatively described as a "limited public forum," and as a "designated public forum." *Kincaid*, 236 F.3d at 348 (citations omitted); *see also Cornelius*, 473 U.S. at 802 (explaining that the government may create a public

forum by its designation of "a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."). As this Court has recently explained, the Sixth Circuit uses the terms "designated public forum" and "limited public forum" interchangeably. *Citizens for Community Values, Inc. v. Upper Arlington Public Library Bd. of Trustees*, 2008 WL 3843579, *5 (S.D.Ohio 2008) (slip op.). However, the Sixth Circuit applies differing levels of scrutiny for each. *Id.* Where there is a designated public forum, the same standards apply as apply to traditional public fora. *Id., citing Pouillon v. City of Owosso*, 206 F.3d 711, 715 (6th Cir. 2000). Where the forum has been open to just certain categories of speakers and subjects, the Sixth Circuit applies a lesser level of scrutiny. *Id.* In such instances, government restrictions on speech must be viewpoint-neutral and reasonable in light of the purpose of the forum. *Id., citing Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001); *see also United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004) (explaining that where the state reserves fora "for certain groups or for the discussion of certain topics," government restrictions on speech must be reasonable and viewpoint neutral, which are the same standards that apply to restrictions on speech in nonpublic forums).

Finally, where there is a nonpublic forum, the government may control access "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Kincaid*. 236 F.3d at 348, *citing Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46.

Plaintiffs argue that Defendants have created either a limited or designated public forum inside City Hall. Defendants argue that this area is a nonpublic forum.

When determining the nature of the forum, the "touchstone of [a court's] analysis is whether the government intended to open the forum at issue." *Kincaid*. 236 F.3d at 348-49 (citations omitted). "To determine whether the government intended to create a limited public forum, we look to the government's policyand practice with respect to the forum, as well as to the nature of the property at issue and its 'compatibility with expressive activity.'" *Id.*, *quoting Cornelius*, 473 U.S. at 802.

In Administrative Regulation #5, the stated purpose of City Hall is to allow "City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati." However, Defendants' stated purpose regarding the use of the interior of City Hall, without more, is not dispositive. This Court must closely examine whether in practice Defendants have consistently enforced the written policy. *United Food & Commercial Workers Union v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 352-53 (6th Cir. 1998). The Court notes that a variety of events have been held by independent individuals and organizations who are not City officials. These events were open to the public, and were only related to the exercise of the rights and responsibilities of the City officials in the most general sense. The City official who sponsors an event is not required to be present at the event, and is often not present. It is clear that City officials use the interior of City Hall however and whenever they desire, without

regard to any limitations. The current version of Adminstrative Regulation #5 does nothing to alter this practice. City officials only need to give notice to the Facilities Management Division "as far in advance of the intended use as reasonably practicable."

In addition, the nature of the areas inside City Hall identified by Plaintiffs are compatible with expressive activity. In so finding, the court is cognizant that the Supreme Court has warned that:

> In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum. Accordingly, we have held that military reservations and jailhouse grounds do not constitute public fora.

Cornelius, 473 U.S. at 804 (citations omitted). As this Court previously noted, the principle function of the lobby and stairs inside City Hall is to serve as an entrance to the building. However, supporters of the school tax levy issue were able to hold a large press conference and rally in this area. Such an event, held on an occasional basis, shows a compatibility with expressive activity. As the Sixth Circuit has instructed: "forum analysis must involve a careful scrutiny of whether the government-imposed restriction on access to public property is truly part of 'the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.'" *UFCW*, 163F.3d at 351-52, *quoting Perry*, 460 U.S. at 49. Administrative Regulation #5 does nothing to limit a City official from sponsoring such an event in any area inside City Hall, on any subject, at any time of

the day. As the Sixth Circuit has explained: "if the 'concept of a designated open forum is to retain any vitality whatever,' we will hold that the government did not create a public forum only when its standards for inclusion and exclusion are clear and are designed to prevent interference with the forum's designated purpose." *Id.* at 352, *quoting Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 251 (3d Cir. 1998). Here the only clear restriction on access to the interior of City Hall is sponsorship of a City official. There is little about this restriction which would prevent interference with the forum's designated purpose of allowing City officials to exercise the rights and responsibilities under the Charter. While this Court previously found that the lobby and stairs inside City Hall are a nonpublic forum, in light of the evidence presented by Plaintiffs as to the use of this area, as well as the other areas inside City Hall, this Court finds that the inner front lobby and first floor staircase on the Plum Street side of City Hall, various conference rooms, and the basement lunchroom in City Hall are limited or designated public fora.

3. Applicable standard for the forum

The Court finds that the interior of City Hall has been open to one category of speakers–those speakers who have the sponsorship of a City official. Therefore, the lesser level of scrutiny is applicable, and Defendants' restriction on speech must be viewpoint-neutral and reasonable in light of the purpose of the forum. The sponsorship requirement is viewpoint-neutral on its face. Even though the City has stipulated that Administrative Regulation #5 could be applied in such a manner as to discriminate on the

basis of viewpoint, the issue of viewpoint discrimination is not before this Court. Plaintiffs have not sought a sponsor for their events, and therefore cannot claim a violation of the First Amendment on this basis.

However, the Court finds that the sponsorship requirement is not reasonably related to the purpose of the forum. The stated purpose of the forum is to allow City officials exercise their rights and responsibilities under the City Charter. The sponsorship requirement only minimally limits speakers and the topics to those related to the work of City officials.

Therefore, the Court concludes that Plaintiffs have shown a likelihood of success on the merits of their First Amendment claim to the extent that it is based upon a facial challenge under the public-forum doctrine.

4. Freedom of association

The Supreme Court has recognized a First Amendment right to associate for the purpose of speaking, which it has termed a "right of expressive association." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547U.S. 47, 68 (2006). The rationale is that "[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others." *Id., citing Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).[9] The Supreme Court

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[9] As the Supreme Court explained in *Roberts*: "An individual's freedom to speak, to worship, and to petition the government for

has also recognized that the freedom to associate "plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623.

The Supreme Court uses a three-step process to analyze an expressive association claim. *Boy Scouts of America v.* Dale, 530 U.S. 640, 648 (2000). First, the Court considers whether the group making the claim engaged in expressive association. *Id.* Second, the Court analyzes whether the governmental action at issue significantly affected the group's ability to advocate public or private viewpoints. *Id.* at 653. Finally, the Court weighs the governmental interest implicated in the action against the burden imposed on the associational expression to determine if the governmental interest justified the burden. *Id.* at 656.

Under this analysis, the Court finds that Plaintiffs engage in expressive association. The parties have stipulated that Plaintiff Miller is a member, supporter and agent of COAST. The parties have stipulated that Plaintiff COAST is an association of individuals organized as a political action committee devoted to advocacy on issues related to limits on the power and intrusiveness of government. Next, the Court finds that the Administrative Regulation #5 significantly affects Plaintiffs' ability to advocate their public viewpoints in that they are unable to hold events inside City Hall.

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the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), *citing Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981).

At the final step, the Court must weigh Defendants' interest in having the sponsorship requirement in place against the burden imposed on Plaintiffs' associational expression. Government action impermissibly burdens the freedom to associate by "interfer[ing] with the internal organization or affairs of the group." *Roberts*, 468 U.S. at 623. The Supreme Court has held that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.* Where the presence of the unwelcome person "affects in a significant way the group's ability to advocate" its viewpoint, the government has infringed on the group's freedom of expressive association. *Dale*, 530 U.S. at 648, *citing New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13 (1988). However, the freedom of expressive association is not absolute. *Id.* The right of expressive association "may be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.' " *Id.*, *quoting Roberts*, 468 U.S. at 623.

Administrative Regulation #5 forces groups, such as COAST, to accept members it does not desire. Specifically, it requires a group to find a City official willing to support its viewpoint in order to garner sponsorship of an event or "assemblage." The Court finds that this forced sponsorship affects in a significant way COAST's ability to advocate its viewpoint because without sponsorship, Plaintiffs are not permitted to hold an event inside City Hall. Therefore, Defendants have infringed on the group's freedom of expressive association. The Court must

next determine whether this right may be overridden. That inquiry centers on Defendants' compelling interest. Administrative Regulation #5 states that Facilities Management is to ensure that the use of the interior of City Hall does not create security problems, unreasonable interference with ingress and egress from City Hall, or unreasonable interference with the other official uses occurring inside City Hall. Based on the foregoing, the Court finds that Defendants have a compelling interest in controlling the use of the interior of City Hall so that City officials are permitted to exercise their rights and responsibilities under the Charter.

However, the Court finds that there are means significantly less restrictive of associational freedoms by which Defendants could control the use of the interior of City Hall. Currently, the only means by which an individual or group may use the interior of City Hall is by finding a sponsor for their event. Therefore, an individual or group has no other avenue other than associating themselves with a City official if they want to hold an event inside City Hall. Therefore, the Court finds that the Plaintiffs have shown a likelihood of success on the merits of their freedom of expressive association claim.

E. Equal Protection

A statute challenged on equal protection grounds will be subject to strict scrutiny when the statute involves a "suspect" classification or has an impact on a "fundamental" right. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 410 (6th Cir. 1999), *citing Clark v. Jeter*, 486 U.S. 456, 461 (1988). The First

Amendment right to free speech and freedom of association are such fundamental rights. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 & n. 8 (1972); *see Brown v. Alexander*, 718 F.2d 1417, 1425 (6th Cir. 1983) (stating that the freedom of association is a fundamental First Amendment right). Because First Amendment rights are impacted by Administrative Regulation #5, strict scrutiny is appropriate.

Strict scrutiny requires the government "to show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45. While Defendants have a compelling state interest in controlling the use of the interior of City Hall, the Court finds that Administrative Regulation #5 is not narrowly drawn to achieve that end. Administrative Regulation #5 provides no guidance as to how Facilities Management is to ensure that the use of the interior of City Hall does not create security problems, unreasonable interference with ingress and egress from City Hall, or unreasonable interference with the other official uses occurring inside City Hall.

Based on the foregoing, the Court finds that Plaintiffs are likely to succeed on the merits of their Equal Protection claim.

F. Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Plaintiffs' due process claim is based upon vagueness and overbreadth doctrines. Plaintiffs argue that

Administrative Regulation #5 lacks objective standards for deciding what speech is permitted inside City Hall.

Imprecise laws can be attacked on their face under two different doctrines. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Id.*, *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Id.*, *citing Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

The overbreadth doctrine is "an exception to traditional rules of standing and is applicable only in First Amendment cases in order to ensure that an overbroad statute does not act to 'chill' the exercise of rights guaranteed protection." *Leonardson v. City of East Lansing*, 896 F.2d 190, 195 (6th Cir. 1990), *citing NAACP v. Button*, 371 U.S. 415, 433 (1963). "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society-to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). Therefore, "[i]n order for a statute to be found unconstitutional on its face on overbreadth grounds, 'there must be a realistic danger

that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court.' " *Leonardson*, 896 F.2d at 195, *quoting City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Plaintiffs have not identified any realistic danger that City Administrative Regulation #5 will significantly compromise the First Amendment rights of parties not before the Court. As such, the Court finds that Plaintiffs have not shown a likelihood of success on the merits of this claim. *Accord Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (explaining that the overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort.").

However, the Court does find merit in Plaintiffs' claim under the vagueness doctrine. Under the First Amendment, speakers are protected from arbitrary and discriminatory enforcement of vague standards. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). Due process requires that this Court hold a statute, ordinance, or resolution void for vagueness "if its prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion." *UFCW*, 163 F.3d at 358-59. In addition, "[t]he absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *Id.* at 359. As the Sixth Circuit has explained:

> Quite simply, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have

> unbridled discretion over a forum's use." *Id.*, *citing Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). We will not presume that the public official responsible for administering a legislative policy will act in good faith and respect a speaker's First Amendment rights; rather, the vagueness "doctrine requires that the limits the [government] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).

Id.

The Court finds that the terms of Administrative Regulation #5 are not clearly defined. The only direction the Regulation provides is that the purpose of the interior of City Hall is to allow City officials "to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati." There are no clear standards which would guide a City official to judge whether a use fell within this specified purpose. As such, the Court finds that Plaintiffs are likely to succeed on the merits of their due process claim based upon the doctrine of vagueness.

The Court also finds that the remaining preliminary injunction factors weigh in favor of Plaintiffs. "The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989). Additionally,

if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment. *Deja Vu*, 274 F.3d at 400. Moreover, "it is always in the public interest to prevent violation of a party's constitutional rights." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), *quoting G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Therefore, the Court concludes that Plaintiffs are entitled to a preliminary injunction enjoining the application of Administrative Regulation#5. Accordingly, the Court enjoins Defendants from applying Administrative Regulation #5 to requests for use of the interior of City Hall.

G. Qualified immunity

In their Motion to Dismiss, Defendants argue that to the extent that the individual defendants are named in their individual capacities, they are entitled to have those claims dismissed based on qualified immunity. However, the parties subsequently stipulated that Defendants Dohoney and Koopman are sued only in their official capacities. (Doc. 28, ¶ 66) Therefore, Defendants' Motion to Dismiss is DENIED on the basis of qualified immunity.

III. CONCLUSION

Based on the foregoing, it is hereby **ORDERED** that:

1. Defendant's Motion to Dismiss the First Amended Complaint (Doc. 19) is **DENIED as MOOT**.

2. Motion in *Limine* to Exclude Plaintiffs' Expert (Doc. 25) is **DENIED as MOOT**;

3. Motion to Strike the Affidavit of Plaintiffs' Proposed Expert (Doc. 37) is **DENIED**;

4. Plaintiffs' Motion for Preliminary Injunction (Doc. 2) is **GRANTED**; and

5. Motion to Dismiss the Second Amended Complaint (Doc. 24) is **DENIED**.

IT IS SO ORDERED.

/s/ Michael R. Barrett
Michael R. Barrett, Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-4679

[Filed November 24, 2010]

MARK MILLER, ET AL.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
CITY OF CINCINNATI, ET AL.,	)
	)
Defendants-Appellants.	)
	)

ORDER

BEFORE: DAUGHTREY, COLE, and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:08-cv-00550
Judge Barrett

[Filed October 21, 2008]

MARK MILLER, et al., individually and on behalf of all others similarly situated,	)
Plaintiffs,	)
v.	)
CITY OF CINCINNATI, et al.,	)
Defendants.	)

JOINT STIPULATIONS OF FACT

Now come Plaintiffs, MARK MILLER, COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES ("COAST") and WEDEMANDAVOTE.COM, individually and on behalf of all others similarly situated, and the Defendants, CITY OF CINCINNATI, MILTON DOHONEY, AND JOEL KOOPMAN, and

hereby stipulate the following facts for this Court. Although these stipulations have allowed the parties to develop a factual record for this Court prior to the Preliminary Injunction hearing, the parties do not waive the right to conduct additional discovery following such hearing and prior to the final trial in this matter. As discovery is ongoing, the parties reserve the right to revise or supplement these statements of fact as necessary. The parties reserve any objection to the relevance and materiality of these stipulated facts.

Old Administrative Regulation #5

1. The City policy regarding use of public buildings was adopted by the City Manager on February 3, 1997. A copy of that policy ("Old Administrative Regulation No. 5") is attached hereto as **Exhibit A**. Old Administrative Regulation No. 5 was in full force and effect until it was replaced on September 9, 2008, by New Administrative Regulation No. 5, attached as **Exhibit B**. The City Manager has provided supplemental direction on the imple-mentation of New Administrative Regulation #5; an electronic mail outlining the supplemental direction is attached hereto as **Exhibit C**. New Administrative Regulation No. 5 and the supplemental directive is the policy currently in effect relative to the use of the interior spaces of City Hall.

2. The use of City Council Chambers and the community room on the third floor of City Hall is subject to the Rules of Council, rather than either Old Administrative Regulation #5 or New

Administrative Regulation #5, specifically Rule 3.1 attached hereto as **Exhibit D**.

3. Pursuant to the City Facility Management's practice under Old Administrative Regulation #5, persons who were authorized to "sponsor" uses of the inside of Cincinnati City Hall were the Mayor, a member of the Cincinnati City Council, the City Manager and his assistants, or City Department Directors or Division Heads.

4. As applied by the Clerk of Council, individuals authorized to reserve the use of Council Chambers and the community rooms (also referred to as Committee Room A and Committee Room B) on the third floor of City Hall, used for City Council committee meetings, are members of Council, the Mayor, the City Manager and his assistants and City Department Directors.

5. Under Old Administrative Regulation No. 5, City Hall rooms 115 and 169 are regularly used for meetings, press conference and other purposes allowed under Old Administrative Regulation No. 5. The basement lunchroom has been used for monthly Bike/PAC meetings and the lobby and interior front steps have been used for charity kickoffs/solicitations, for the display of art work and the Christmas tree, and for the Issue 10 Rally and Press Conference.

6. The calendar maintained by the City from February 3, 1997 to present (note for some of such spaces all of the years in question were not available) for the uses of City Hall Conference

Room 115 is attached hereto as **Exhibit E-1.** The calendar maintained by the City from March 2002 to present for the uses of City Hall Conference Room 169 is attached hereto as **Exhibit E-2.** The combined calendar maintained by the City from January 2006 to present for the uses of City Hall's City Council Chambers and the community room on the third floor of City Hall is attached hereto as **Exhibit E-3.** The City represents that there is no calendar or log book relating to the use of the front lobby and interior first floor staircase (Plum Street side) (the "Lobby and Steps").

7. From February 3, 1997, to the present, various private individuals and organizations participated in certain uses occurring in City Hall arranged or requested by City Officials/ employees including some uses indicated by the calendars and the following:[1]

Lobby and first floor staircase (Plum Street side)

a) February 27, 2008, rally and press conference promoting the passage of Issue 10, including representatives of Parents for Public Schools of Greater Cincinnati, the AMOS Project and the Baptist Ministers Conference of Cincinnati and Vicinity. Requested by

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[1] The Parties agree that the Court may rely upon the exhibits attached hereto for additional information on the uses or groups described in Paragraph 7.

Councilmember John Cranley's office. **Exhibits F-1, F-2 and F-3** are email communications regarding the rally and press conference and **Exhibit F-4** is a press release from CASE describing the rally and press conference.

b) Occasional annual rallies for charitable City sponsored giving campaigns (specifically, the United Way, United Negro College Fund, Community Shares and Fine Arts Fund).

c) Tables for United Way and Fine Arts Fund solicitations during the respective City charitable giving campaigns.

d) In 2000, display of the piece of art entitled "The Memorial of Our Lost Children", comprised of shoes, toys and other items that belonged to murdered children.

e) In December of each year, a Christmas tree display and other holiday decorations.

f) Jan Leslie of CASE maintains that sometime between the years 2000 and 2004 there was one other rally and press conference involving the Cincinnati Public Schools tax levy,

arranged by one of the council members or the mayor.

Basement Lunchroom

g) Regular monthly meetings of the City's Department of Transportation and Engineering's Bike/Pedestrian Advisory Committee, which is staffed by City employees, from 2004 to 2007.

h) May 9, 2006 - American Bicyclists held a Bicycle Commuter Course presentation as part of the above referenced Bike/Pedestrian Advisory Committee meeting.

Room 115

i) March 3 & 10, 1997 – During the City's Fine Arts Fund campaign, the Administration held a prize drawing for employee contributors to the Fine Arts Fund.

j) November 12, 1997 – Keep Cincinnati Beautiful, a City contractor, held a meeting. A copy of the current contract is attached hereto as **Exhibit X**.

k) March 5, 1998 – SEEPAC, requested by Cincinnati Police Department employee Laura Williams.

l) November 12, 1998 – American Society for Public Administrators, board meeting and luncheon.

m) April 21, 1999 – Keep Cincinnati Beautiful, a City contractor, held a meeting.

n) July 20, 1999 – Persons interested in bringing a professional women's soccer team held a press conference with Councilmember Todd Portune. Attached **Exhibit G** provides further detail.

o) September 13, 1999 – Soccer Committee, requested by Karen Ball of Councilmember Todd Portune's office.

p) October 25, 1999 –International Visitors Council, requested by City Manager's Office employee Gina Ruffin. Further information on the International Visitor's Council of Greater Cincinnati is provided in attached **Exhibit H**.

q) November 12, 1999 – ICMA (International City/County Management Association) had its annual convention in Cincinnati in 2000; local co-chair John Shirey (City Manager) held a meeting to plan for fundraising associated with the committee's responsibilities.

r) February 14, 2000– Fundraiser, Water Works employee Pat Herold (now deceased).

s) September 18, 2000 – Room held all day for ICMA meeting per City Manager.

t) October 6, 2000 – United Way meeting requested by Shirley Dunham of Councilmember Crowley's office.

u) October 26, 2000 – United Way meeting requested by Shirley Dunham of Councilmember Crowley's office.

v) March 23, 2001 – City's United Negro College Fund Drive – "A Taste of City Hall" fundraiser.

w) April 15, 2002 – Press Conference/ Senator Mallory, requested by Department of Community Development employee Velda Boyd. A press release providing further information is attached hereto as **Exhibit I**.

x) September 3, 2003 –United Way meeting requested by the City's Public Information Officer Meg Olberding.

y) September 25, 2003 – Hamilton County Convention Facilities

Authority meeting, attended by City Officials.

z) December 18, 2003 – meeting of EITC Partnership/ Make Work Pay, requested by Councilmember Pepper. Copies of articles and web pages explaining the group are attached hereto as **Exhibits J-1 and J-2.**

aa) December 19, 2003 – meeting of EITC Partnership/ Make Work Pay, requested by Councilmember Pepper.

bb) May 25, 04 – Office of National Drug Policy press conference.

cc) February 3, 2005 – City's Fine Arts Fund Campaign kickoff.

dd) June 21, 2006 – Kids Voting seminar on local government, requested by Councilmember Monzel. Further information attached hereto as **Exhibit K**.

ee) February 13, 2008 – Mayor's annual Youth in City Government program

ff) February 29, 2008 – American Idol celebrity Randy Jackson gave a speech about heart health, requested by Councilmember Berding.

gg) August 23, 2008 – Ohio Department of Corrections Director Terry Collins

spoke about the campaign "Who killed our kids?", requested by Mayor Mallory. Further information is attached as **Exhibit L**.

Room 169

hh) November 19, 2002 – Keep Cincinnati Beautiful, a City contractor, held a meeting.

ii) February 27, 2003 – Hamilton County Convention Facilities Authority orientation meeting, attended by City officials.

jj) September 14, 2006 – Earned Income Tax Credit meeting, requested by Carla Walker of the Mayor's office.

Council Chambers and Committee Room

kk) January 11, 2007 – Cincinnati Teen Court, mock trial program, requested by Councilmember Cole.

ll) August 14, 2007 – Youth Recognition Ceremony, requested by Councilmember Thomas.

mm) September 28, 2007 – United Way campaign requested by Water Works.

nn) December 12, 2007 – Green & Healthy Schools meeting, addressing issues related to building environ-

mentally friendly schools and the environmental and health issues impacting areas in which schools are located. Requested by Councilmember Qualls.

oo) March 12, 2008 – Truman Scholarship interviews, requested by Councilmember Cranley. Further information attached hereto as **Exhibits M-1 and M-2**.

pp) April 24 & 25, 2008 – Mayor's Concert Series, performed by Linton Chamber Music.

qq) 8 & 9 May 08 – Mayor's Concert Series, performed by Linton Chamber Music.

rr) 8 Sep 08 – City's United Way Campaign, requested by Councilmember Berding.

ss) 17 Oct 08 – SORTA, requested by Councilmember Bortz.

tt) For each of the past three years, the Greater Cincinnati Chamber of Commerce, Leadership Cincinnati program has held either part or all of its Government Day session in either Cincinnati City Council Chambers or the community room – these events were arranged by the City Manager's Office.

8. Each of the following independent organizations are not City departments, divisions, or contractors: the AMOS Project, the Baptist Ministers Conference of Cincinnati and Vicinity, the International Visitors Council, American Society for Public Administrators, the ICMA (International City/County Management Association), United Way, United Negro College Fund, the Fine Arts Fund, Kids Voting, Delta Sigma Theta Sorority (for a description of this organization, see attached **Exhibit Y**), the Linton Chamber Music Series and Harry S. Truman Scholarship Foundation. Keep Cincinnati Beautiful is an organization independent from the City of Cincinnati and is not a City department or division, but it is a City contractor pursuant to an Agreement with the City of Cincinnati and performs services for the City pursuant thereto.

9. The Cincinnati Public Schools, the University of Cincinnati, the Office of National Drug Policy, PUCO (the Public Utilities Commission of Ohio), SORTA (Southwest Ohio Regional Transit Authority) and Teen Court (a project of Hamilton County) are governmental entities separate and distinct from the City of Cincinnati. The Hamilton County Convention Facilities Authority is a public body organized and existing pursuant to Chapter 351 of the Ohio Revised Code.

10. In 2002, Senator William Mallory was not an official of the City of Cincinnati.

New Administrative Regulation #5

11. Under New Administrative Regulation #5, the word "assemblages" as used in the third paragraph, may include rallies and press conferences at which expressive activities may take place.

12. Under New Administration Regulation #5, the only assemblages that may take place inside of Cincinnati City Hall (with the exception of meetings of public bodies of the City) are those held pursuant to the first sentence of the third paragraph of New Administrative Regulation #5.

13. Pursuant to the City Facility Management's practice under New Administrative Regulation #5, persons/entities authorized to "use interior spaces of City Hall for assemblages," are the Mayor, City Council members, the City Manager and his assistants, City Department Directors and City Commissions and Boards.

Stipulations applicable to both Old Administrative Regulation #5 and New Administrative Regulation #5

14. Pursuant to both the City Facility Management's practice under Old Administrative Regulation #5 and New Administrative Regulation #5, the person who sponsored the use (under Old Administration Regulation #5) and the "use[r] [of] interior spaces of City Hall for assemblages" (under New Administrative Regulation #5) did not nece-

ssarily need to attend the use and/or participate in the use in order for it to proceed.

15. Pursuant to both the City Facility Management's practice under Old Administrative Regulation #5 and New Administrative Regulation #5, private individuals could appear, speak, hold signs or engage in other communicative activities at allowable uses inside City Hall as long as such communication is consistent with the message conveyed at such use.

16. Pursuant to both the City Facility Management's practice under Old Administrative Regulation #5 and New Administrative Regulation #5, any of the individuals authorized to "sponsor" uses (as set forth in Stipulation #2, above) or "use the areas inside of Cincinnati City Hall for assemblages" (as set forth in Stipulation #12, above) could allow the use of such areas for an event or assemblage in support of or in opposition to issues appearing on the ballot at a forthcoming election.

17. Pursuant to all of (i) the City Facility Management's practice under Old Administrative Regulation #5, (ii) the Rules of Council and (iii) New Administrative Regulation #5, the person who could sponsor a use inside of City Hall (as set forth in Stipulation #3, above), the persons authorized to reserve Council Chambers and the third floor community room (as set forth in Stipulation # 4, above), and persons who could "use interior spaces of City Hall for assemblages" (as set forth in

Stipulation # 14, above), were or are able to use his or her full and independent discretion (except as provided below) in determining whether to sponsor such use or use such space for an assemblage, including sponsoring a use of such space for an assemblage at which private individuals or groups could appear, speak, hold signs or engage in other communicative activities.

The parties DO NOT agree on the following alternate additional language. It is included for purposes of showing their area of disagreement.

A. With respect to the foregoing, the City maintains that the exercise of such discretion was and is constrained, (i) as to Old Administrative Regulation #5, as stated in Mr. Koopman's letter dated April 29, 2008, that Cincinnati City Hall (as one of many City Facilities) was to be used "for conducting business related to the functions of [the City's] various departments in serving the citizens and by City Council in the performance of their duties" and (ii) as to New Administrative Regulation #5, is to be used only for "allowing City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati."

B. With respect to the foregoing, Plaintiffs maintain that there was and is no

constraint on the exercise of such discretion per the language of Old Administrative Regulation #5, as well as in actual practice.

18. Under the City Facility Management's practice under Old Administrative Regulation #5 and under New Administrative Regulation #5, in order for private individuals to participate in a rally and press conference inside of City Hall, such individuals would need to politically or administratively collaborate with the Mayor, a member of the Cincinnati City Council, the City Manager and his assistants, a City Department Director, or a City Board or Commission. The City's policy allows full and independent discretion to each of the aforementioned individuals in determining whether or not to politically or administratively collaborate with private individuals. Because of the requirement for political or administrative collaboration with City officials, it was and remains possible that private advocates of one position, *e.g.*, the "Yes" position, on a ballot issue, could participate in a rally or press conference inside City Hall, and advocates of the opposite viewpoint, *e.g.*, the "No" position on the same ballot issue, could not participate in a similar rally or press conference inside City Hall unless those advocating such opposite viewpoint could also politically or administratively collaborate with one of the aforementioned individuals.

General Statements

19. In the City of Cincinnati, there is 1 Mayor, 9 members of Council, 31 Directors of City Departments and 89 Division Heads within the City's Departments.

20. City Hall is not accessible by private individuals from 5:30 p.m. through 8:00 a.m. every weekday and all day Saturday and Sunday, except for invitees of City employees with special access passes and for specified after-hours events. The main entrance to City Hall is adjacent to the interior lobby and all other entrances to City Hall are closed.

21. The grounds outside City Hall are generally available to the public for certain expressive activity 24 hours/day, seven days/week.

22. There is no difference in the procedure to be followed under Old Administrative Regulation #5 and New Administrative Regulation #5 for an independent person or organization to try to achieve political or administrative collaboration with a City official for purposes of conducting an assemblage inside City Hall.

23. The articles attached hereto as **Exhibits N-1** and **N-2** are true and accurate recitals of the rally and press conference that occurred on the Lobby and Steps on Wednesday, February 27, 2008 and the accompanying photo accurately depicts the rally and press conference.

24. To the extent that it depicts the rally inside City Hall, the WCPO news story, a DVD of which is attached hereto as **Exhibit O**, accurately depicts the rally of that day on the first floor Lobby and Steps on Wednesday, February 27, 2008.

25. Christopher P. Finney, attorney for Plaintiffs, wrote to City Manager Milton Dohoney on April 28, 2008, asking to "have a press conference and rally" in "exactly the same location as" used for the Issue 10 Rally and Press Conference on May 5, 2008. A copy of that letter is attached as **Exhibit P**.

26. Joel Koopman, City Facilities Manager, wrote back to Mr. Finney on April 29, 2008. A copy of his response letter is attached as **Exhibit Q**.

27. Mark Miller wrote again to Mr. Koopman requesting use of the same spaces, this time for an August 20, 2008 rally and press conference. A copy of his letter is attached as **Exhibit R**.

28. Mr. Koopman responded to Mr. Miller's letter on August 1, 2008. A copy of his response letter is attached as **Exhibit S**.

29. If Plaintiffs had asked for use of other spaces in City Hall (e.g., conference rooms 115 and 169 and the basement lunchroom) in the same manner as set forth in Exhibits P and R, the response would have been the same as set forth in Exhibits Q and S.

30. If Plaintiffs had asked for use of City Council Chambers and/or the third floor community room in the same manner as set forth in Exhibits P and R, the Clerk of Council's response would have been substantially the same as set forth in Exhibits Q and S.

31. Plaintiffs' two requests to use an interior space at City Hall were functionally equivalent in form and substance to the Issue 10 Rally and Press Conference organizers' request and the CCV Press Conference organizers' request except that (a) Plaintiffs asked in writing, (b) Plaintiffs asked City Manager Dohoney directly (a designated City official authorized to arrange for such use) and the Issue 10 Rally and Press Conference and the CCV Press Conference organizers directed their requests to the offices of Council members, (c) for the Issue 10 Rally and Press Conference and the CCV Press Conference, the relevant Council members' aides arranged for the use of space within City Hall with Facilities Management, as described in attached Exhibit U, (d) organizers of the Issue 10 Rally and Press Conference and the CCV Press Conference administratively or politically collaborated with the offices of the relevant City officials.

32. The only reason that Facilities Management did not approve the Plaintiffs' use of the interior space of City Hall because they lacked a political or administrative collaboration with one of the designated City officials authorized to arrange for such use.

33. Instead of conducting their rallies/press conferences in the interior spaces of City Hall, Plaintiffs conducted their rallies/press conferences on the exterior front steps leading into City Hall in May and August 2008. Attached hereto as **Exhibit Z** are photographs of both rallies/press conferences.

34. Photos of (i) the Lobby and Steps, (ii) basement lunch room of City Hall as of October 16, 2008, (iii) City Hall Conference Room 115, (iv) City Hall Conference Room 169, (v) Council Chamber of City Hall, and Council Community Room, all as of as of October 16, 2008, are attached as **Exhibit T**. These photos fairly and accurately portray the relevant areas of City Hall as of October 16, 2008 and are substantially similar to the relevant areas as they existed during the uses set forth in Paragraph 7 of these stipulations.

35. As it relates to reserving space in the interior of City Hall, Facilities Management and the Clerk of Council confirmed that when a City official/employee requested use of City Hall space, Facilities Management and the Clerk of Council reserved the space with a brief description of the purpose of the event, assuming that the uses were for a proper purpose but without analysis of whether the City official or employee was actually "conducting business relating to the functions of our various departments in serving the citizens and by City Council in the performance of their duties[,]" or "exercising the rights and responsibilities specified in the Charter of the

City of Cincinnati[,]" or engaged in "the public business of the City" or "other public business."

Issue 10 Rally

36. On February 27, 2008, a rally and press conference was held inside of Cincinnati City Hall in support of Issue 10 (the "Issue 10 Rally and Press Conference"), which was a school levy appearing on the ballot in the forthcoming election.

37. Representatives of the Issue 10 campaign worked with Council members Cranley and Crowley in support of Issue 10. A representative of the Issue 10 campaign contacted Councilmember John Cranley's office to use the Lobby and Steps for the Issue 10 Rally and Press Conference.

38. In Jan Leslie's oral communication with Councilmember John Cranley's aide, Gina Marsh, to arrange the Issue 10 Rally and Press Conference, Leslie asked Marsh: "can you set this up?" The words "sponsor" and "sponsorship" were never discussed. Based on this oral communication, Marsh requested City Facilities Management to arrange for use of the space.

39. Gina Marsh contacted Facilities Management and made the arrangements for use of City Hall. An e-mail communication from Gina Marsh of John Cranley's Council office to Joel Koopman, City Facilities Manager, and his response and further communications are attached hereto as **Exhibit U**.

40. On February 27, 2008, a resolution in support of Issue 10 was on the City Council Agenda and was supported by a number of City Council members including Council members Cranley and Crowley. That resolution was "filed" without being voted upon by the Council.

41. With respect to the Issue 10 Rally and Press Conference, the City of Cincinnati provided the podium and microphone used for that rally.

42. Following the Issue 10 Rally and Press Conference, no one made any oral or written complaints that the Issue 10 Rally created any violation of fire or other safety codes.

43. At the time that the Issue 10 Rally and Press Conference occurred, it was part of the City's standard operating practice for a security guard to be posted at the entrance into Cincinnati City Hall and for visitors to City Hall to sign in with the guard. The security log book entries for that date are attached hereto as **Exhibit V**.

44. Since the Issue 10 Rally and Press Conference, security procedures at City Hall were changed to require that security personal stationed at the entrance to Cincinnati City Hall possess a firearm. **Exhibit AA**, attached hereto, further describes City Hall security procedures.

45. The City maintains that the Issue 10 Rally and Press Conference was consistent with its policies in effect at that time as to the use of the interior spaces of City Hall.

CCV Press Conference

46. On June 9, 2008, a press conference was held inside the Cincinnati City Hall at which Citizens for Community Values ("CCV") called upon *CityBeat* to stop accepting adult advertisements (the "CCV Press Conference").

47. Councilmember Monzel's aide, Brad Beckett, contacted the City Manager's office and made arrangements for the use of Conference Room 115 of City Hall for that press conference. The City Manager's office then contacted the City Facilities Manager to complete the arrangements for use of Conference Room 115 of City Hall for the CCV Press Conference.

48. Concurrent with the CCV Press Conference, a letter to John Fox, Editor and copublisher of *CityBeat* was distributed. The letter had at its bottom the names of 39 individuals, including Councilmember Chris Monzel. A copy of that letter is attached hereto as **Exhibit W.**

49. In David Miller's oral communication to Brad Beckett to arrange for the CCV Press Conference, Miller requested only "to use" a conference room. The words "sponsor" and "sponsorship" were never discussed. Based on this oral communication, Beckett requested City Facilities Management to arrange for use of the space.

50. Councilmember Monzel was not present at the CCV Press Conference.

51. No City official or employee spoke at the CCV Press Conference.

52. Aides for Council members Monzel and Cole were in attendance and observed the CCV Press Conference from the back of the room.

53. With respect to the CCV Press Conference, the City of Cincinnati provided the podium and microphone used for that rally.

54. The CCV Press Conference did not create any security problems at Cincinnati City Hall.

55. The CCV Press Conference did not unreasonably interfere with any official business occurring elsewhere inside of Cincinnati City Hall.

56. Items related to the issues relevant to the CCV press conference were not then and are not now on the City Council agenda.

Additional Stipulations Relating to Allegations in Complaint

57. Plaintiff Mark Miller is a citizen and taxpayer of the State of Ohio and is a member, supporter and duly authorized agent of COAST. Miller regularly engages in a variety of expressive activities and expects and intends in the future to continue his community involvement and concomitant expressive activity.

58. Plaintiff Coalition Opposed to Additional Spending & Taxes ("COAST") is a continuing

unincorporated association of individuals organized as a political action committee under the laws of the State of Ohio devoted to advocacy on a variety issues limiting the power and intrusiveness of government year after year. COAST has been in continuous existence since 1999. COAST advocates publicly in favor of its view of sound fiscal policy, and frequently engages in ballot issue efforts and campaigns. It also advocates on legislative and legal issues from time to time. At all relevant times hereto, COAST has been involved in and supportive of an initiative effort restricting the ability and authority of the Council of the City of Cincinnati to implement an automated photo-monitoring program to enforce claimed violations of City traffic laws.

59. In addition to bringing this action individually and on behalf of all others similarly situated, COAST brings this action on behalf of its supporters.[2]

60. During the summer of 2008, COAST also joined a drive to place a second initiative on the November ballot: the use of a system of proportional representation to elect the Cincinnati City Council. Furthermore, COAST intends to engage in the same or similar advocacy in the future regarding taxing and spending issues by the City of Cincinnati, and, in such advocacy, now and in the future, to avail

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[2] References to COAST include both the organization as an entity and its individual supporters and members.

itself of the fora that the City has made available to City officials and private individuals or groups who politically or administratively collaborate. Through the course of its advocacy, historically and prospectively, COAST has engaged and intends to continue to engage in a variety of expressive activities, including petition drives, press conferences, press releases, public statements and demonstrations.

61. Plaintiff WeDemandAVote.Com is an unincorporated association or coalition of individuals and organizations. WeDemand AVote.Com is involved in numerous local issues and in the course of this involvement, regularly engages in a variety of expressive activities, including petition drives, press conferences, press releases, public statements and demonstrations. At all relevant times hereto, COAST has been a part of WeDemand AVote.Com and supporter of the efforts of WeDemandAVote Com relative to stopping the implementation of an automated photo-monitoring program to enforce claimed violations of City traffic laws and implementing proportional representation for the election of the Cincinnati City Council. WeDemand AVote.Com expects and intends to continue its community involvement and concomitant expressive activity and desires, in such efforts, to avail itself of the interior of City Hall. Through the course of its activities, WeDemand AVote.Com regularly engages in a variety of expressive activities, including petition drives,

press conferences, press releases, public statements and demonstrations.

62. On August 6, 2008, by a vote of 4 – 4, Cincinnati City Council defeated an ordinance submitted by the City Manager's Office that selected a vendor for the "red light camera" project. The ordinance was drafted and submitted as a result of Council's inclusion of projected red light camera revenues in the 2008 City budget, and followed an RFP process in which a particular vendor was selected.

63. Defendant City of Cincinnati is a municipal corporation, capable of being sued and organized and existing under the Ohio Revised Code. Defendant City of Cincinnati adopted and implemented some or all of the policies, practices or customs at issue in this case. Milton R. Dohoney, Jr., is the City Manager for the City of Cincinnati and, as such, is responsible for the day-to-day operations of the City of Cincinnati.

64. Joel Koopman is the Facilities Manager for the City of Cincinnati. Attached exhibits describe his responsibilities as they relate to the use of the interior of City Hall.

65. All actions by the Defendants at issue in this case were undertaken under color of state law.

66. Defendants Dohoney and Koopman are sued only in their official capacities and have no personal liability in this matter.

67. Cincinnati City Hall is located at 801 Plum Street, in Hamilton County, Ohio.

68. In late 2007 or early 2008, the Cincinnati Public School Board voted to place on the ballot at the primary election of March 4, 2008, an emergency operating levy for the Cincinnati Public Schools. This issue appeared on the March 4, 2008 ballot as Issue 10.

69. Participants and speakers at the Rally and Press Conference in the Lobby and Steps included representatives from various private organizations, including Parents for Public Schools of Greater Cincinnati, Cincinnatians Active to Support Education ("CASE"), the AMOS Project and the Baptist Ministers Conference of Cincinnati and Vicinity.

70. At the School Levy Rally, one of the speakers was Pamela Green of the private organization Parents for Public Schools of Greater Cincinnati. During her political speech, Ms. Green led the individuals who had assembled on the Lobby and Steps inside of Cincinnati City Hall in chanting the slogan "Yes on 10, for our children".

71. In addition to Ms. Green, other speakers at the Rally and Press Conference included Jan Leslie of CASE, Mark G. Turner of CASE, Rosa Blackwell who was the Superintendent of Cincinnati Public Schools, Rev. Richard Bollman of the AMOS Project, and Rev. James Pankey who was the president of the Baptist Ministers Conference.

72. For several months (including at the time that they made their initial request to use the Lobby and Steps of Cincinnati City Hall for a rally and press conference, see paragraph 25, *supra*), Plaintiffs had been engaged in an initiative petition effort seeking to amend the Charter of the City of Cincinnati to prohibit the implementation of an automated photo-monitoring program to enforce claimed violations of City traffic laws. Such an amendment would preclude the council of the City of Cincinnati from enacting legislation currently being considered that would provide for the placement of unmanned red light cameras and speeding cameras throughout the geographic boundaries of the City of Cincinnati. Plaintiffs also participated over the summer of 2008 in a second petition drive to place a Charter Amendment on the ballot to change the way City Council was election to a "proportional representation" electoral method.

73. Plaintiffs sought to conduct their press conference and rally on Wednesday, August 20, 2008 at 2:00 PM. This event was intended to announce and celebrate the turn-in of more than 14,000 signatures collected for the proposed red light camera amendment to the City Charter and more than 15,000 signatures for the proportional representation amendment to the City Charter. City Council placed the two proposed Charter Amendments discussed herein before the voters. The Ohio Constitution at Article XVIII, Sections 8 and 9, dictates that these petitions must be submitted, reviewed and voted on by the City Council at least sixty

(60) days before the November 4, 2008 election day. If there was a late submittal and a concomitant delay, the November 4, 2008 election would have been missed, and a subsequent and costly special election would be constitutionally mandated.

74. Article XIII, Section III of the City Charter provides:

Section 3. Public Financing of Campaigns

Notwithstanding anything in this Charter to the contrary, no monies of the City of Cincinnati or any of its Boards or Commissions, from any source whatsoever, or funds of any other entity disbursed by the City or any of its Boards or Commissions, may be disbursed to any candidate for any public office, campaign committee of any candidate for any public office, political action committee, or political party, or may be expended for the purpose of advocating the election or defeat of any candidate for any public office, or for the passage or defeat of any ballot issue.

75. Plaintiffs desire to use the interior of City Hall for communicative activities without the necessity of associating with a City-connected sponsor or user or otherwise "politically or administratively collaborating" with someone authorized by the City to arrange for such use for communicative activities.

76. Plaintiffs, either individually or collectively, seek to conduct within Cincinnati City Hall

further press conferences and rallies on the initiative on prohibiting red-light-camera enforcement of the traffic laws, as well as an initiative on proportional representation for city council elections. Such press conferences and rallies would be conducted up to the forthcoming election on November 4, 2008.

77. Each of the Plaintiffs has an historical and continuing involvement and interest in civic affairs, including in matters extending beyond the 2008 elections. As a result, Plaintiffs, either individually or collectively, also intend, in the future, *i.e.*, beyond the November 4, 2008 election day, to be engaged in public initiative and public advocacy relating to the City of Cincinnati, above and beyond the current initiative effort, and during the course of which to hold press conferences and rallies within Cincinnati City Hall.

78. As described in these stipulations, the City Manager's adoption of Old and New Administrative Regulation No. 5, his delegation of authority to Facilities Management to manage the uses of interior spaces within City Hall, the decisions and implementing actions of Facilities Management pursuant to that delegation of authority, and City Council's adoption of Rule 3.1 of the Rules of Council, constitute official policies and practices of the City of Cincinnati. The action of any individual councilmember does not in and of itself constitute an official policy, custom practice or usage of the City of Cincinnati.

Respectfully submitted,

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